ANN JOO INTEGRATED STEEL SDN BHD v. PEMUNGUT DUTI SETEM

HIGH COURT MALAYA, KUALA LUMPUR
NOORIN BADARUDDIN J
[ORIGINATING SUMMONS NO: WA-24-21-04-2021]
4 OCTOBER 2022

Abstract – *The material difference between sub-items 22(1)(a) and 22(1)(b) of the First Schedule to the Stamp Act 1949 is that the former would apply to bond, covenant or instrument for a definite and certain period of time so that the total amount to be ultimately payable could be ascertained. On the other hand, sub-item 22(1)(b) applies where the bond, covenant or instrument are for the term of life or any other indefinite period.*

REVENUE LAW: *Stamp duty – Assessment – Appeal against – Letter of offer for credit from bank – Whether letter of offer stated loan instrument had security whatsoever and must be repayable on demand or in single bullet payment – Whether letter of offer qualified for remission of stamp duty under Stamp Duty (Remission) (No. 2) Order 2012 – Stamp Act 1949, s. 38A(7), First Schedule item 22(1)(a), (b)*

STATUTORY INTERPRETATION: *Statutes – Taxing statute – Remission of stamp duty – Correct approach to be given – Whether strict interpretation ought to be accorded – Plain, natural and ordinary meaning – Stamp Duty (Remission) (No. 2) Order 2012 – Stamp Act 1949, s. 38A(7), First Schedule item 22(1)(a), (b)*

The plaintiff accepted a letter of offer ('LO') for credit from the bank, amounting to RM105,000,000. Upon submission of the LO to the defendant, the plaintiff was informed by the defendant that the LO was not qualified for remission of stamp duty under the Stamp Duty (Remission) (No. 2) Order 2012 ('Remission Order'). The plaintiff then received the notice of stamp duty assessment issued by the defendant. The plaintiff proceeded to make stamp duty payment under protest, in accordance with s. 38A(7) of the Stamp Act 1949 ('Act'). The plaintiff filed a notice of objection against the assessment. In the present stamp duty appeal, the plaintiff sought for, *inter alia*, a declaration that the notice of stamp duty assessment issued by the defendant was erroneous, null and void. The plaintiff took the position that: (i) the LO clearly stated that the loan instrument had no security whatsoever and must be repayable on demand or in a single bullet payment. Therefore, the LO fell squarely within para. 2 of the Remission Order which qualified for remission of stamp duty in excess of 0.1%; and (ii) the correct approach to be adopted in interpreting a taxing statute was that it should be given a

A strict interpretation, by giving their plain, natural and ordinary meaning and no intendment could be made in favour of tax liability. The defendant, on the other hand, argued that (i) there was no error in the assessment and the LO was correctly charged to stamp duty under item 22(1)(a) of the First Schedule to the Act and the Remission Order was, therefore, not applicable
B to the LO; and (ii) the LO did not spell out that the sums of money must be paid by way of demand or single bullet payment and was, therefore, not liable to stamp duty as a loan agreement or loan instrument under item 22(1)(a) of the First Schedule to the Act.

Held (allowing appeal with costs):

C
(1) The availability of the facility was subject to the bank's right to recall/cancel the facility or any part of it at any time the bank deemed fit where the facility of such part shall be cancelled and the whole indebtedness or such part be repayable on demand. There was, in fact, no definite or certain period of time prescribed under the LO for the credit facilities
D given to the plaintiff. The LO, therefore, fell under sub-item 22(1)(b) of the First Schedule to the Act, qualifying for remission of stamp duty under the Remission Order. (paras 13 & 15)

(2) There was no ambiguity in the Remission Order. The wordings in
E para. 2 of the Remission Order was plain and clear. It was applicable to a loan agreement or loan instrument which was chargeable under sub-item 22(1)(b) of the First Schedule to the Act, had no security whatsoever and was either repayable on demand or in a single bullet repayment. (para 19)

F **(3)** There was no room to rewrite and change the meaning of the LO and the Remission Order which were clear and unambiguous. There was no scope to innovate or take upon itself the task of amending or altering statutory provisions or any clear contract or agreement. The defendant had no legal or factual basis in contending that the LO was subject to
G sub-item 22(1)(a) of the First Schedule to the Act. The LO qualified for remission of stamp duty under the Remission Order. The LO fell squarely within the Remission Order and ought to be stamped at the rate of 0.1%. (paras 22 & 24)

Case(s) referred to:

H *National Land Finance Co-operative Society Ltd v. Director General of Inland Revenue [1993] 4 CLJ 339 SC* ***(refd)***

UMBC v. Pekeliling Triangle Sdn Bhd [1991] 2 CLJ 1470; [1991] 1 CLJ (Rep) 474 SC ***(refd)***

Legislation referred to:

Stamp Act 1949, ss. 38A(7), 39(1), (2), First Schedule item 22(1)(a), (b)

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Other source(s) referred to:
Sergeant and Sims on Stamps Duties, 9th edn, p 18

For the plaintiff - S Saravana Kumar, Nur Hanina Mohd Azham & Yap Wen Hui; M/s Rosli Dahlan Saravana Partnership
For the defendant - Normareza Mat Rejab (SRC) & Syazana Safiah Rozman; RC

Reported by Najib Tamby

JUDGMENT

Noorin Badaruddin J:

[1] This is a stamp duty appeal under s. 39(1) of the Stamp Act 1949 ("the Act") made by way of a case stated pursuant to s. 39(2) of the Act. The plaintiff is seeking for *inter alia* a declaration that the notice of stamp duty assessment dated 13 February 2019 issued by the defendant ("the assessment") is erroneous, null and void.

[2] Pursuant to s. 39(1) of the Act, the opinion of this court is sought on whether the letter of offer dated 27 December 2018 executed between Alliance Bank Malaysia Berhad and the plaintiff falls within the Stamp Duty (Remission) (No. 2) Order 2012 (the "remission order").

Brief Facts

[3] On 27 December 2013, the plaintiff accepted a letter of offer for credit ("letter of offer") from Alliance Bank (the "bank") amounting to RM105,000,000.

[4] On 31 January 2019, upon submission of the letter of offer to the defendant, the plaintiff was informed by the defendant that the letter of offer is not qualified for remission of stamp duty under the remission order.

[5] On 13 February 2019, the plaintiff received the notice of stamp duty assessment dated 13 February 2019 issued by the defendant.

[6] On 14 February 2019, the plaintiff proceeded to make stamp duty payment under protest in accordance with s. 38A(7) of the Act *vide* letters dated 14 February 2019 and 11 February 2019.

[7] On 28 February 2019, the plaintiff through its' previous solicitors filed a notice of objection against the assessment pursuant to s. 38A of the Act.

The Plaintiff's Contentions

[8] The plaintiff takes the position that the letter of offer clearly states that the loan instrument has no security whatsoever and must be repayable on demand or in a single bullet payment. Therefore, the letter of offer falls squarely within para. 2 of the order which qualifies for remission of stamp duty in excess of 0.1%.

[9] It is contended that the correct approach to be adopted in interpreting a taxing statute is that it should be given a strict interpretation, by giving their plain, natural and ordinary meaning and no intendment can be made in favour of tax liability.

The Defendant's Contentions

[10] Summarily, the defendant takes the position that there is no error in the assessment and the letter of offer was correctly charged to stamp duty under item 22(1)(a) of the First Schedule of the Act and the remission order is therefore not applicable to the letter of offer. It is contended that the letter of offer does not spell out the sums of money must be paid by way of demand or single bullet payment and is therefore liable to stamp duty as a loan agreement or loan instrument under item 22(1)(a) of the First Schedule of the Act.

Findings

[11] Sub-item 22(1) of the First Schedule of the Act upon being amended by the Finance Act 2018, states the following:

> Bond, Covenant, Loan, Services, Equipment Lease Agreement Or Instrument of any kind whatsoever:
>
> (1) Being the only or principal or primary security for any annuity (except upon the original creation thereof by way of sale or security, and except a superannuation annuity), or for any sum or sums of money at stated periods, not being interest for any sum secured by a duly stamped instrument, nor rent reserved by a lease or tack:
>
> (a) **for a definite and certain period so that the total amount to be ultimately payable can be ascertained**.
>
> (b) **for the term of life or any other indefinite period**:
>
> for every RM100 and also for any fractional part of RM100 of the annuity or sum periodically payable.
>
> (emphasis added)

[12] It is apparent that the material difference between sub-items 22(1)(a) and 22(1)(b) of the First Schedule to the Act is that the former would apply to bond, covenant or instrument for a definite and certain period of time so that the total amount to be ultimately payable can be ascertained. On the other hand, sub-item 22(1)(b) First Schedule of the Act applies where the bond, covenant or instrument are for the term of life or any other indefinite period.

[13] Upon perusal of the letter of offer, this court finds that the availability of the facility is subject to the bank's right to recall/cancel the facility or any part thereof at any time the bank deems fit whereupon the facility of such

part thereof shall be cancelled and the whole indebtedness or such part thereof be repayable on demand. The specific condition for repayment is stated in the letter of offer as follows:

> Specific Conditions For TF
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> (i) Repayment
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> Notwithstanding any other provisions herein stated related to the availability of the Facility or any part thereof, the Bank reserves the right to recall/cancel the facility or any part thereof **at any time** it deems fit without assigning any reason thereto by giving written notice of the same, whereupon the facility of such part thereof shall be cancelled and the whole indebtedness or such part thereof be repayable on demand.
>
> ...
>
> 2. Forward Foreign Exchange ("Forex")
>
> Specific Condition:
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> Repayment Notwithstanding any other provisions herein stated related to the availability of the Facility or any part thereof, the Bank reserves the right to recall/cancel the facility or any part thereof at any time it deems fit without assigning any reason thereto by giving written notice of the same, whereupon the facility of such part thereof shall be cancelled and the whole indebtedness or such part thereof be repayable on demand.
>
> (emphasis added)

[14] The defendant contends that the letter of offer does not spell out the sums of money to be paid must be by way of demand or single bullet repayment. It is further contended that the specific condition for trade facilities under item (i) "repayment" only deals with the situation when the trade facilities are recalled or cancelled by the bank. According to the defendant if such situation occurs, the plaintiff will have to pay the sums of money expended under the trade facilities upon demand by the bank, it is argued that the specific condition for forward foreign exchange ("forex") under item "repayment" only deals with the situation when the forex is recalled or cancelled by the bank. If such situation occurs, the plaintiff will have to pay the sums of money expended under the forex upon demand by the bank. According to the defendant, there is no specific provision on how repayment of the loan is to be made in the ordinary course *ie*, if the trade facilities or forex is not recalled or cancelled by the bank and that in any event it must be clearly shown that under the letter of offer, the mode of repayment of the loan is either upon demand or single bullet repayment.

[15] This court finds that there is in fact no definite or certain period of time prescribed under the letter of offer for the credit facilities given to the plaintiff. The letter of offer therefore, falls under sub-item 22(1)(b) First Schedule of the Act qualifying for remission of stamp duty under the remission order.

[16] Paragraph 2 of the remission order states that:

> The amount of stamp duty that is chargeable under sub-subitem 22(1)(b) of the First Schedule to the Act upon a loan agreement or loan instrument without security for any sum or sums of money repayable on demand or in single bullet payment under that sub-subitem which is in excess of zero point one per cent (0.1%) is remitted.

[17] There is no specific requirement under the remission order for the sums of money to be paid under the letter of offer to be by way of demand or single bullet repayment in the ordinary course. The letter of offer clearly states that the security is on clean basis:

> Security/Support
>
> On clean basis.

[18] It can therefore be understood that there is in fact no security and the bank reserves the right to recall/cancel the facility or any part thereof at any time it seems fit without assigning any reason by giving written notice of the same, whereupon the facility of such part thereof shall be cancel and the whole indebtedness or such part thereof be repayable on demand.

[19] There is no ambiguity in the remission order. The wordings in para. 2 of the remission order is plain and clear, it is applicable to a loan agreement or loan instrument which is chargeable under sub-item 22(1)(b) of the First Schedule of the Act, has no security whatsoever and is either repayable on demand or in a single bullet repayment.

[20] In *UMBC v. Pekeliling Triangle Sdn Bhd* [1991] 2 CLJ 1470; [1991] 1 CLJ (Rep) 474, the Supreme Court had laid down the rules of construction of documents for stamp duty purposes and of stamp duty legislation which was well summarised in the following passages from *Sergeant and Sims on Stamps Duties* (9th edn) at p. 18:

> (a) General rule of construction of charge
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> It is a well-settled rule of law that every charge upon the subject must be imposed by clear and unambiguous language, *Denn & Manifold v. Diamond* [1825] 4 B&C 243, and a statute imposing a tax upon the subject should always receive a strict interpretation and should not be allowed to operate as a charge unless the words are plain and unambiguous, *Daines v. Heath* [1847] 3 CB 938. The party who seeks to bring an instrument within the Stamp Act must show clearly that it falls within it, and no intendment can be made in favour of the liability, *Phillips v. Morrison* [1844] 13 LJ Ex 212, and see *R v. Winstanley* [1831] 1 Cr & J 434.
>
> (b) Ambiguity
>
> If the statute is so indefinite and uncertain that it can be treated in two ways and the true construction of it is open to two views, one more favourable to the Crown and the other to the subject, then the latter

construction should be adopted, *Clifford v. IRC* [1896] 2 QB 187, approved and followed in *Henneil v. IRC* [1933] 1 KB 415 CA. In other words, the subject, and not the Crown, is entitled to the benefit of the doubt *R v. Winstanley*, *supra*.

[21] The defendant ought to give the remission order its plain and ordinary meaning as it is trite law that strict interpretation of taxing statutes must be given. In *National Land Finance Co-operative Society Ltd v. Director General of Inland Revenue* [1993] 4 CLJ 339 the Supreme Court had held that:

> ... in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax.
>
> Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used ...

[22] It is the finding of this court that the letter of offer as well as the remission order are clear and there is no room for this court to re-write and change the meaning of the letter of offer and the remission order which are clear and unambiguous. There is no scope for the court to innovate or take upon itself the task of amending or altering statutory provisions or any clear contract or agreement. It is of the considered view that the defendant has no legal or factual basis in contending the letter of offer is subject to sub-item 22(1)(a) of the First Schedule of the Act.

[23] The letter of offer falls under the scope of sub-item 22(1)(b) of the First Schedule to the Act. On a plain reading of para. 2 of the remission order, the plaintiff has fulfilled all the requirements stipulated thereunder where the letter of offer clearly states that security is on clean basis *ie*, without any security and that the bank reserves the right to recall/cancel the facility or any part thereof at any time it seems fit without assigning any reason by giving written notice of the same, whereupon the facility of such part thereof shall be cancelled and the whole indebtedness or such part thereof be repayable on demand.

Conclusion

[24] Premised on the reasons above, this court finds that the letter of offer qualifies for remission of stamp duty under the remission order. The letter of offer falls squarely within the remission order and ought to be stamped at the rate of zero point one per cent (0.1%).

[25] The plaintiff's appeal was therefore allowed with costs.